

Enkapsis and the Development of Customary International Law

An Encyclopedic Approach to Inter-legality

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The jurists are still searching for their concept of law.¹

To be required to think of law in terms of interconnectedness, among many normativities' 'ins', prevents our search for law from being stuck in one of them or in the other, that is, the *aut-aut* between 'being in' or nothing. Legality again surfaces through the cases as a *continuum*, underlying discrete and separate bodies of law.²

1 Introduction

According to Jean d'Aspremont's historiography of the four lives of customary international law (CIL), the 2018 Report of the International Law Commission (ILC) on the identification of CIL has all but solidified the 'formal acceptance' of the proposition that practice and *opinio juris* can be

^{*} I am grateful to Israel Costa, Rudi Hayward, Angela Aguinaldo, Chhaya Bhardwaj and Ruben Alvarado for their comments on an earlier version of this chapter. Special thanks go to DFM Strauss and Alan M Cameron, not only for their comments on the chapter but also for making available to me relevant working drafts of the works by Herman Dooyeweerd referenced here that are still being translated as I write. Moreover, the patient and extensive editing help extended to me by the volume editors beat this essay into a much better shape than what was otherwise possible. All errors point to me.

¹ I Kant, as quoted in H Dooyeweerd, *The Encyclopedia of the Science of Law*, Vol 8/1 (RD Knudsen tr & AM Cameron ed, Paideia Press 2012) 89; from the original German, 'Noch suchen die Juristen eine Definition zu ihrem Begriffe vom Recht' in I Kant, *Kritik der reinen Vernunft* (2nd ed, Groszherzog Wilhelm Ernst 1787) 556. I owe the German reference to DFM Strauss.

² G Palombella, 'Theory, Realities, and Promises of Inter-Legality: A Manifesto' in J Klabbers & G Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019) 380.

extracted from the very same acts. With the report, ‘practice and *opinio juris* no longer needs to be subject to two distinct tests’, and ‘practice is no longer restricted to conduct (action or in-action) strictly speaking, but also includes verbal acts and what State officials say, the latter having the potential to be constitutive of both practice and *opinio juris*’.³ Thus, the ILC unwittingly overturned a ninety-eight-year-old tradition on the roots of CIL in Article 38 of the Statute of the Permanent Court of International Justice and ironically recovered its original unitary form.

But perhaps, because d’Aspremont’s essay is essentially a historical reconstruction, he does not offer an account of the philosophical approaches that support the conclusion that CIL is the convergence of state practice and *opinio juris*. In this chapter, I will argue that such an account cannot be divorced from the larger question of an integrating theoretical account of the sources of law itself, of which CIL is but a part. In fact, the question of CIL brings front and centre the question of the concept of law.

Here I turn to the work of the Dutch Christian philosopher Herman Dooyeweerd (1894–1977), former chair of jurisprudence and the history of Dutch law at the Vrije Universiteit Amsterdam (VU), for an integrating theoretical account of custom as a source of international law, based on a systematic concept of law, which he termed the *Encyclopaedie van de Rechtswetenschap* (*Encyclopedia of the Science of Law*). In more than 200 publications, Dooyeweerd fleshed out his own approach to philosophical thought while wrestling with the reigning neo-Kantian legal philosophies of his day. He inaugurated what has been called a ‘reformational’ philosophical approach, drawing from insights of his predecessor Abraham Kuyper (1837–1920), polymath Dutch statesman, journalist, theologian and founder of the VU Amsterdam. Kuyper had introduced the sociological principle ‘*souvereiniteit in eigen kring*’ (sovereign in its own orbit)⁴ to guarantee the independence of various spheres of life from unwelcome state encroachment. Dooyeweerd transformed it into an ontological or a ‘cosmological’ principle for a systematic theoretical account of a universal modal structure of reality.⁵

³ J d’Aspremont, ‘The Four Lives of Customary International Law’ (2019) 21 *IntCLRev* 229.

⁴ It is better known via its shorter form ‘sphere sovereignty’. René van Woudenberg, ‘Theories of Modes of Being (Modalities)’ in *Philosophical Foundations I Reader*, International Masters in Christian Studies of Science and Society Program (Vrije Universiteit Amsterdam 2006) 3. Articles compiled in the Reader are not numbered sequentially.

⁵ *ibid.* See also, R. D. Henderson, *Illuminating Law: The Construction of Herman Dooyeweerd’s Philosophy, 1918–1928* (PhD thesis, Vrije Universiteit Amsterdam, 1994)

His mature system is contained in the three-volume *New Critique of Theoretical Thought*, first published between 1953 and 1958.⁶ This was a major revision in English of his Dutch-language *De Wijsbegeerte der Wetsidee* (WdW), which had been published in the 1930s. However, it was in his lesser known *Encyclopedia* – transcripts published by the Student’s Council of the VU for use in his jurisprudence and history of law classes – where he first elaborated his philosophical approach.

Dooyeweerd’s *Encyclopedia* offers an engaging framework for understanding ‘the challenge of inter-legality,’ or the question of ‘the ways through which legal domains end up overlapping due to the interconnection of substantive, material objects’.⁷ In inter-legality, we are confronted with a ‘plurality of legalities’⁸ even if embodied in a single specimen of law. Here, ‘the law surfaces as the composite legal nature of the issue under scrutiny’⁹ demonstrating resilient and reflexive ‘material interconnectedness’¹⁰ ‘among functional fields’.¹¹ Moreover, this composite question arises from ‘the overlapping among regimes and orders’,¹² which are also self-referential and coherent in themselves.¹³

In Sections 2–3, I will present key features of Dooyeweerd’s systematic theory of law as embodied in his *Encyclopedia*, notably, his theory of the modal aspects and his theory of entities, whose correlation are essential for constructing a comprehensive concept of law. In Sections 4–7, I deploy Dooyeweerd’s concept of (legal) ‘enkapsis’, to show that CIL’s various manifestations exhibit the phenomena of inter-legality, and that enkapsis is a promising guide for understanding the phenomena. To that end, I will present an analysis of concrete examples from two interrelated and celebrated international law cases.

131–51. The work referred to here is the self-published book version of Henderson’s doctoral dissertation.

⁶ H Dooyeweerd, *The Collected Works: A New Critique of Theoretical Thought Series A*, Vols 1–4 (DH Freeman & H De Jongste trs & DFM Strauss ed, first published 1953–58, The Edwin Mellen Press 1997). Vol 4 is a comprehensive index to the first three volumes. The first volume of *A New Critique* is marked as 1/1, the second volume, 1/2, and so on. Paideia Press has since assumed responsibility for the publication of *The Collected Works* (hereinafter *A New Critique*).

⁷ J Klabbers & G Palombella, ‘Introduction’ in J Klabbers & G Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press 2019) 1.

⁸ Palombella (n 2) 380.

⁹ *ibid.*

¹⁰ *ibid.* 368.

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

2 Dooyeweerd's Encyclopedic Approach to the Concept of Law

Dooyeweerd asserts that the question of 'legal sources' constitutes 'the key problem for the entire positive science of law as a specific discipline'.¹⁴ Of course many scholars have posed the problem in different ways. Remarking on eight theories of the sources of law in his time, Dooyeweerd concludes that they reveal 'the almost chaotic confusion regarding the meaning in which the phrase "legal source" is employed'.¹⁵ These approaches either explain law by reference to one or other non-legal factors (for example, as a function of history, or of social practices, or of logical concepts, thus obscuring the boundary between law and other spheres of human life) or take the opposite direction, removing law totally from its inner connections with the other spheres of life by positing a transcendent source without any further scientific elaboration.¹⁶ Each is founded on a particular 'cosmonomic idea' or theory of the ordering of reality and its essential elements. Such a 'philosophic ground idea'¹⁷ shapes in profound ways the concept of law and the theory of the sources of law.

Dooyeweerd's 'transcendental critique of theoretical thought' asserts that every scientific endeavour is founded on pre-scientific and pre-theoretical commitments that are in the final analysis religious in nature, because they point to an ultimate conviction about the nature of things.¹⁸ This is the inner connection between theoretical or scientific knowledge and religious conviction.¹⁹ Various scientific disciplines must thus be seen in the context of the whole of human knowledge,²⁰ whose various areas have 'an inner coherence and are not simply related to each other in

¹⁴ This is from a provisional, unpublished and unpaginated draft translation of two monographs strung together, H Dooyeweerd, *Tentative Encyclopedia*, Vol 8/4, to be published by Paideia Press. The intended encyclopedia includes an *Introduction* (Vol 1), *A History of the Concept of Encyclopedia and the Concept of Law* (Vol 2), *The Elementary and Complex Basic Concepts of Law* (Vol 3), *The Typical Basic Concepts of Law and The Theory of the Sources of Law* (Vol 4) and the unfinished *Revised Introduction* (Vol 5). Only the encyclopedia's first volume (see n 1 of this chapter) has been published as part of *The Collected Works*. The others are in varying stages of translation and editing, thus the label 'Tentative' is used for the relevant volumes. The encyclopedia is the 8th volume in the A Series (multiple-volume sets) of *The Collected Works of Herman Dooyeweerd*, hence the labels 8/1 for the first volume, 8/2 for the second volume, and so on.

¹⁵ *ibid.*

¹⁶ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/4.

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 11.

an external and arbitrary fashion'.²¹ This requires philosophical presuppositions that direct a comprehensive account of the 'mutual relationship and coherence of the jural aspect with the remaining aspects of reality'.²² Pre-scientific knowing is not invalidated but understood as primary. It enables humans to experience events, acts, things and relations as individual, temporal totalities, their different aspects not separately conceived but encountered in their unbroken and mutual coherence with the whole of reality.²³ In contrast, in theoretical thought, different aspects of reality are analysed and distinguished from one another. The theoretical work of any discipline – the theoretical attitude of knowing, involves the *Gegenstand* relation.²⁴

3 The Three Interrelated Pillars of *The Encyclopedia of the Science of Law*

Rejecting an account of the state as the sole lawmaker, Dooyeweerd also proffers a pluralist ontology founded on the philosophical principle of sphere sovereignty as a source of diverse structural-material principles for legal or jural positivisation. Here, there are three interrelated pillars anchored on two horizons of human experience, constituted by his interlocking theory of modal aspects and theory of entities. The first pillar is his modal theory of the jural aspect, which is one of the irreducible yet interconnected universal multidimensional modes or aspects of reality. The second pillar is his theory of entities, which gives rise to law unique to their particular practice (entities as rule complexes, each sovereign in its own orbit, exhibiting a 'differentiated responsibility'²⁵ and 'distinctive integrity'²⁶ unique to its nature). The third pillar is the various ways in which entities engage in relations of enkapsis or enkaptic interlacement – resulting in a complex intertwinement of the formal and the material sources of law.

²¹ *ibid.*

²² *ibid.* 86.

²³ *ibid.* 23.

²⁴ *ibid.*

²⁵ JW Skillen, *Recharging the American Experiment: Principled Pluralism for Genuine Civic Community* (Baker 1994) 61–82; B Goudzwaard, *A Christian Political Option* (H Praansma tr, Wedge Publishing 1972) 38–39.

²⁶ H van Riessen, *The University and Its Basis* (The ACHEA Press 1997) 5; the 1963 edition of the monograph used the phrase 'sphere sovereignty' but an unlisted editor's flourish replaced it with the phrase 'distinctive integrity' in the 1997 edition.

3.1 *The Jural Aspect among the Modal Aspects*

In Dooyeweerd's mature systematic philosophy, fifteen universal mutually irreducible but mutually coherent 'modal aspects' of temporal reality occur in the following particular order: numerical, spatial, movement (or kinematic), physical, biological, psychical, logical, historical, lingual (or symbolical), social, economic, aesthetic, jural, moral and the pistical (also referred to as faith or certitudinal aspect). His theory of the modal aspects 'is the distinctive and original element of his philosophical systematics, which includes his legal philosophy'.²⁷ His general modal theory of these aspects accounts for basic diversity in reality and the unity and coherence that can be found within such diversity. The modal aspects are not specific things but the 'different modes of the universal "how" [that] determine the aspects of our theoretical view of reality'.²⁸ All things, entities, events and relations function in all of the irreducible, universal aspects. Everything displays all of the aspects in some way.

The *Encyclopedia* as a scientific practice examines the nature of the jural dimension that gives to legal phenomena their jural character,²⁹ distinguishing the jural aspect from all other aspects of reality, and accounting for the former's internal structure as it is interconnected with those of the other aspects.³⁰ The jural aspect gives the concrete human laws their inherent legal normativity, with an original meaning – or 'meaning kernel' – for the jural aspect alone (in the same way that the other aspects have a meaning-kernel or nuclear moment proper to each of their spheres, which cannot be defined by any of the other aspects).³¹ The meaning-kernel of the jural aspect, according to Dooyeweerd, is 'retribution', which is not to be confused with its criminal law sense. In his sense, retribution is an irreducible mode of balancing and harmonising individual and social interests. It implies 'a standard of proportionality regulating the legal interpretation of social facts and their factual social consequences in order to maintain the juridical balance by a just

²⁷ AM Cameron, 'Introduction' in Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 10. The suite of modal aspects and their particular ordering are provisional, albeit the product of much reflection and analysis.

²⁸ Dooyeweerd, *A New Critique* (n 6) Vol 1/1, 3.

²⁹ AM Cameron, 'Dooyeweerd on Law and Morality: Legal Ethics – a Test Case' (1998) 28 *VictoriaUnivWellLawRev* 263.

³⁰ Thus, even the Hartian notion of 'ordinary language' is not really ordinary; it is in fact a product of theoretical abstraction, of the *Gegenstand*-relation; see HLA Hart & T Honoré, *Causation in the Law* (2nd ed, Clarendon Press 2002) 2, 29.

³¹ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 3.

reaction, *viz.* the so-called legal consequences of the fact related to a juridical ground'.³²

This broader idea of retribution 'involves an appeal to all of the modal aspects of reality that precede it in the order of the aspects'.³³ Such an appeal expresses an indissoluble relationship between and among aspects through a series of analogies, as 'no single aspect stands by itself: everyone refers within and beyond itself to all the others'.³⁴ Yet each has its own unique, undefinable and intuitive core that qualifies its nature and character and directs its full expression in its interlocking coherence with all the other aspects. Jural normativity – 'the perspective of law'³⁵ – as distinct from other normativities such as economic, social, historical, aesthetic or ethical, can neither be replaced nor erased because it is one of the different interlocking modes of being in reality. But according to the principle of sphere sovereignty, the jural aspect's own meaning-kernel should determine how it uses the analogies from all the other aspects for each concrete situation of jural positivisation.

Dooyeweerd's modal theory provides the building blocks to a full concept of law. Its complex of aspectual analogies or connections pointing backward from the jural aspect – the retrocipations³⁶ – are a substratum, *constitutive* spheres or aspects, without which the jural aspect and any legal system cannot exist; meanwhile the post-stratum connections pointing forward – the anticipations³⁷ – are *regulative* in nature,³⁸ as they deepen the constitutive meaning of the jural aspect by opening-up its ethical (moral) and certitudinal (faith) anticipations in the formative historical process of societal 'disclosure'.³⁹ So-called primitive societies are 'closed'

³² Dooyeweerd, *A New Critique* (n 6) Vol 1/2, 129.

³³ AM Cameron, 'Jural Aspect in Dooyeweerd's Philosophy of Law' in C Benge (ed), *In a Reformational Key: Papers Presented for the Life, Work and Vision of Duncan Roper* (Thumbwidth Press 2020) 292.

³⁴ Dooyeweerd, *A New Critique* (n 6) Vol 1/1, 3, fn 1; this internal interconnectedness from within each modal aspect to all the others is what Dooyeweerd calls 'sphere universality'; see Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 123.

³⁵ Palombella (n 2) 376.

³⁶ Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 103.

³⁷ *ibid.*

³⁸ The distinction made here between the constitutive and the regulative is not Dooyeweerd's, but is a device borrowed from Kant and deployed by some of his interpreters to explain the dynamic interaction between the lower and upper strata of Dooyeweerd's theory of modal aspects; see HJ van Eikema Hommes, *Major Trends in the History of Legal Philosophy* (North Holland 1979) 374–75; DFM Strauss, *Philosophy: Discipline of Disciplines* (Paideia Press 2009) 312–13; and AM Cameron, 'Introduction' in *Encyclopedia* (n 1) Vol 8/1, 8–9.

³⁹ *Encyclopedia* (n 1) Vol 8/1, 103.

legal systems, valid and working within their own contexts but yet unable to move beyond a most basic system of accountability and punishment, in the absence of disclosed and deepened anticipatory aspects.⁴⁰

This process of disclosure – directed by the certitudinal or faith aspect – may happen for better or for worse, as such leading could also take an ‘apostate direction’,⁴¹ in which certain aspects of reality are deified and absolutised.⁴² Moreover, these analogies are expressed in two correlated grids: of the law or norm side, and subject, or factual side, of reality, such that one is meaningless without the other.⁴³ Every concrete fact is subject to this cosmic law-ordering – the modal aspects in which those facts function. Such law-ordering on the norm side correlated with the factual side is only discernible in their positivisation in concrete legal phenomena.⁴⁴ Yet they are not reducible to each other.⁴⁵

Thus the ‘architectonic’ modal structure of the jural aspect embodies the following analogies: (numerical) legal unity and multiplicity; (spatial) legal area of validity of legal norms and the juridical place of legal facts, legal subjects, etc; (kinematic) legal constancy and legal dynamism of norms and facts subject to them; (physical) legal force of legal validity and legal causality; (biotic) legal life and competent legal organs; (psychical) ordering legal will and legal will of subjective parties; (logical) legal identity, legal contradiction, legal attribution and imputation; (historical) legal power or legal competence and legal form-giving by competent legal organs; (lingual or symbolical) legal declaration, legal signification and legal interpretation; (social) legal intercourse and correlation of communal and inter-individual or coordinational relationships; (economic) legal economy and equilibrium; (aesthetic) legal harmony and proportionality; (moral) legal morality; and (faith) legal faith or legal conviction.⁴⁶ Therefore, the problem

⁴⁰ *ibid* 104; in his early philosophy as expressed in the *Encyclopedia*, only the modal retro-cipations were called analogies while the forward-looking aspects were called ‘modal anticipations’; see Cameron, ‘Introduction’ in Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 103.

⁴¹ H Dooyeweerd, *Roots of Western Culture* (J Kraay tr, M Vander Vennen & B Zylstra eds, Paideia Press 2012) 105.

⁴² *ibid*.

⁴³ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 293.

⁴⁴ Cameron, ‘Law and Morality’ (n 29) 13.

⁴⁵ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 293; in other words, the norm/fact distinction.

⁴⁶ Eikema Hommes (n 38) 374–75. Eikema Hommes already reflects Dooyeweerd’s mature philosophy here.

of 'law-ascertainment'⁴⁷ in international law will involve the investigation and application of every analogy involved in the modal structure of the jural aspect.

3.2 *Theory of Entities, Enkapsis and the Sources of Law*

Dooyeweerd's theory of the modal aspects is interlocked with his theory of entities. The theory of entities deals with how things, events and relationships exhibit typical functions within the modal aspects. Each entity or relationship displays all modal aspects at the same time but there will always be two aspects which will exhibit and define its particular identity. These are the founding and the qualifying functions. The founding function is the aspect qualifying the process of transformation of an entity.⁴⁸ The qualifying function is an entity's intrinsic purpose. The intrinsic purpose qualifies the thing's internal structure.⁴⁹ The qualifying function is also the 'individual leading function' that plays a role in an entity's internal unfolding process,⁵⁰ through which the function acquires 'an internal structural coherence'.⁵¹

The difference between a modal and entitary perspective is that the latter is focused on the qualifying function of things; the former is not.⁵² An entity's qualifying function shows that its identity cannot be understood through the theory of modal aspects but that nevertheless, its structural unity expresses itself in all modal functions.⁵³ In this way, Dooyeweerd's theory of entities accounts for entitary distinctiveness: family, marriage, church, mosque, temple, corporation, museum, university, a humanitarian NGO, an international organisation or state, each of them imbued with an original material competence, with their own sphere sovereignty. Family or marriage is founded on the biotic aspect but qualified by the ethical aspect; a church, a mosque and a temple are all founded in the historical aspect and all qualified by the faith aspect;

⁴⁷ The task of distinguishing law from non-law, in d'Aspremont's terms; J d'Aspremont, *Formalism and the Sources of International Law: A Theory of Ascertainment of Legal Rules* (Oxford University Press 2018) 1.

⁴⁸ R Clouser, *The Myth of Religious Neutrality* (University of Notre Dame Press 2005) 263.

⁴⁹ R van Woudenberg, 'Theories of Thing-Structures' in *Philosophical Foundations I Reader* (International Masters in Christian Studies of Science and Society Program, VU Amsterdam 2006-7) 6.

⁵⁰ Dooyeweerd, *A New Critique* (n 6) Vol 1/3, 59.

⁵¹ van Woudenberg (n 49) 6; Dooyeweerd, *A New Critique* (n 6) Vol 1/3, 90.

⁵² *ibid.*

⁵³ *ibid.*

a corporation is founded in the historical aspect but qualified by the economic aspect; a museum, a university or a humanitarian NGO are all founded in the historical aspect but have different qualifying functions: aesthetic for the first, logical for the second and ethical for the third. The UN and the state are founded in the historical aspect but both are qualified by the jural aspect. Each has an intrinsic jural competence as an entity, community or institution. Their legal personality is not dependent on the grant of recognition by the state or any other institution. The radical implications of this differentiated social ontology for international law may be summarised in the following description: '[d]ifferent social relationships have different characters, different kinds of law-making requirements, different foundations'.⁵⁴ The structural principles that arise out of differentiated societal entities, spheres, and relations form the building blocks of Dooyeweerd's theory of the sources of law: all law displaying the typical individuality structure of a particular community of inter-individual or inter-communal relationship, in principle falls within the material-jural sphere of competence of such a societal orbit, and is only formally connected (in its genetic form) with spheres of competence of other societal orbits.⁵⁵ A legal source is every juridical form in which those organs of a communal or coordinational relationship in the mutual correlation of these communal and coordinational functions, who are competent to form law, positivise legal principles into valid law within a given life context.⁵⁶

Societal structural principles rooted in the differentiated creational order 'lie at the basis of every formation of positive law and it is only these principles that make the latter only possible'.⁵⁷ In addition, his theory of entities also accounts for their interrelationships. Here, what Dooyeweerd calls 'enkapsis' comes to the fore. These interlacements are 'free forms of positivisation',⁵⁸ owing to their 'typical historical foundation'⁵⁹ – or to their development located in the unfolding of the differentiation of society. Enkapsis is the 'complicated manner in which the simple entities are interlaced with each other by the cosmic order of

⁵⁴ JW Skillen, 'Development of Calvinistic Political Theory in the Netherlands, with Special Reference to the Thought of Herman Dooyeweerd' (PhD Thesis, Duke University 1973) 388.

⁵⁵ Dooyeweerd, *A New Critique* (n 6) Vol 1/3, 670.

⁵⁶ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/4.

⁵⁷ Dooyeweerd, *A New Critique* (n 6) Vol 1/3, 669.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

time and through which they are united, in part, within complex structural totalities'.⁶⁰

Enkapsis happens in the mutual intertwinement of differently qualified societal spheres and relationships, which are 'pheno-typical'⁶¹ forms. By this, he means that in these relationships, the inner natures of the societal spheres are not at all obliterated by their particular interlacements. There are different types of enkapsis that are entitary and structural, such as the correlative and the unilateral. In a correlative enkapsis, two structures presuppose each other, as in the case of interlacements between communal and coordinational relationships. A variation of correlative enkapsis is territorial enkapsis, where all differentiated societal structures are territorially bound to the state in whole or in part.⁶² Moreover, in concrete expressions – of positivised – law or of formal law proper, there is what may be called 'legal' enkapsis. In other words, positivised laws found in the various spheres of competence are inter-linked with one another in complex ways.⁶³

A Kelsenian purely formal law in which all positive law is material leads to 'a radical levelling of the material structural differences amongst the various jural norm-systems'.⁶⁴ Rather, a material classification of law should be based on the 'typical internal character of the various norm complexes of a legal order'.⁶⁵ A formal law must also be distinguished from material competence. Formal law is determined by the different enkaptic relations that happen in the interlacement of different societal structures and relationships.⁶⁶ Material competence refers to the invariant structural principles of the various societal relationships that are sovereign in their own spheres; the latter are the material sources of law.⁶⁷ One and the same genetic form positivising jural principles (that is, a formal source of law) may involve an original source of law in one sphere of competence but may be a derived source of law in another sphere.⁶⁸ While a formal law is

⁶⁰ Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 219.

⁶¹ Dooyeweerd, *New Critique* (n 6) Vol 1/3, 664.

⁶² *ibid.* 662.

⁶³ Compare this with what Palombella says of inter-legality: 'Inter-legality . . . starts from the fact that interconnections make up for a kind of *composite law*, one that results out from the contents of separate sources, in a number of recurrent situations', in Palombella (n 2) 375.

⁶⁴ Dooyeweerd, *A New Critique* (n 6) Vol 1/3, 204.

⁶⁵ *ibid.* 199.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

inextricably bound with a law-forming organ, such an organ is interwoven with various material spheres of competence, so that it can never be the sole source of validity of all positive law.⁶⁹ Validity and positivity are inextricably connected; there is no juridical validity without positivity, just as there is no positivity without the juridical validity of norms.⁷⁰ This is his ‘material juridical meaning-theory of validity’:⁷¹ ‘with its entire sphere-sovereignty every positive legal order rests on the *changing* meaning of those law-spheres lying at the foundation of the jural sphere’.⁷²

Transformations in the constitutive spheres lead to corresponding transformations in the positivisation of structural principles. It remains the task of the leading formers of law to be properly guided by faith – by their ultimate commitments – in a way that does not distort or deny the jural limits or boundaries between and among societal spheres and relations.

4 Dooyeweerd’s Critique of CIL as an Indirect (Formal) Source of Law

The now familiar two-element test of the crystallisation of customary norms comprising the *opinio* and *longaevus usus* requirements, according to Dooyeweerd, proceeds from the assumption that it is the ‘sole indirect mode of legal formation’.⁷³ But such an approach ‘can never qualify custom to become a legal source, because, as we know, a legal source [in the formal sense] is unthinkable without a competent formative legal organ’.⁷⁴

4.1 *The Antinomy of Opinio and Usus*

To begin with, there is an inner antinomy to the accepted formula ‘*opinio* and *usus*’, because the former ‘concerns a jural anticipation within the psychic sphere’, which in the first place ‘presupposes the jural’, which it then attempts to define.⁷⁵ As an earlier and distinct aspect, the psychic aspect cannot define what is normative of the jural aspect, for such would

⁶⁹ *ibid.*

⁷⁰ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/4.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

deny the jural aspect its inherent normativity and violate the principle of sphere sovereignty, in which no aspect is reducible to any other aspect. That is, the accepted notion of an *opinio* is an improper understanding of the analogy to the psychic sphere, which precedes and anticipates (points towards) the jural aspect in Dooyeweerd's suite of fifteen modal aspects. Rather, in the unbreakable law-side and factual-side correlation, the analogy to the psychic sphere on the law side is the basic concept of the function of the legal will expressed as 'a legally ordering will of an organ competent to form law'.⁷⁶

On the factual side, the analogy to the psychic aspect is expressed in the 'will-function of a legal subject correlated with the ordering will of a competent organ and capable of accepting jural responsibility and normative accountability for its acts in legal life'.⁷⁷ Only a competent organ has the legal power (an analogy to the human formative historical aspect) to positivise structural principles into law. This is an important requirement, given current proposals for deformalisation in law-ascertainment in international law.⁷⁸ Law-ascertainment cannot be divorced from the question of who has competence as a legal organ to positivise material-legal principles into law. Thus the work of such a competent organ (itself an analogy to the biotic sphere) should not be confused with the scientific description of norms positivised into law by such competent organ, as in the case of the writings of legal scholars or publicists on CIL.⁷⁹ Also, *longaevus usus* is not a requirement for the indirect formation of law, as a rule may develop into CIL within just a brief period of time.⁸⁰

An example is the quick adoption of cruiser rules in naval warfare to submarine warfare, following the experience of World War I. In regard to this, 'a positive piece of the law of nations was formed with regard to the competence to take custody and to bring in with submarines commercial ships, analogous to the existing positive law practice applicable to cruisers'.⁸¹ This came about because of 'a series of legal actions which succeeded each other relatively quickly'.⁸² He might be

⁷⁶ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3 20.

⁷⁷ *ibid.*

⁷⁸ As critiqued in chapter 5 of d'Aspremont, *Formalism* (n 47) 118–36.

⁷⁹ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 28; see also d'Aspremont's point on the 'secondary role' of international legal scholars as 'grammarians of formal law-ascertainment who systematize the standards of distinction between law and non-law'; d'Aspremont, *Formalism* (n 47) 209.

⁸⁰ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 28.

⁸¹ *ibid* Vol 8/4.

⁸² *ibid.*

referring here to Part IV of the Treaty of London of 22 April 1930, which bound submarines to extant rules applicable to surface warships when dealing with merchant ships. According to that treaty provision, surface warships and submarines may not attack a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. The only exceptions are when the vessel refuses to stop on being summoned, or when it resists a visit or search.⁸³ Thus, although CIL is an indirect way of forming law, like a treaty, it presupposes the same original competent organ (here, the states in their mutual consent).⁸⁴ It was adopted by the major naval powers of the era and many others from their experience of World War I, when submarines were first widely used. However, of forty-nine nations that were parties to the treaty, each of the major powers abrogated the treaty as soon as war broke out again.⁸⁵ Here, Dooyeweerd also anticipated by at least three decades the ruling of the *North Sea Continental Shelf* case that widespread and representative adoption of a conventional norm by non-signatory states, even within a short span of time, may transform it into CIL.⁸⁶

Yet, the rise and fall of this legal regime invokes the various analogies in the architectonic modal structure of the jural aspect: in the human formative unfolding process (historical aspect), new rules have to be drafted to apply to a new horrific method of waging war, spurred by technological developments – submarine warfare. The legal life of the treaty, and the CIL on which it was based, proved short-lived (biotic aspect), enjoying a brief legal constancy but eventually losing to the legal dynamism of lawmaking (kinematic aspect) brought about by new historical circumstances, and resulting in the loss of its legal force (physical aspect) in the waters subjected to the legal regime (spatial aspect), as legal subjects – states, who are also legal ordering organs (psychic aspect) – broke faith (analogy to the faith aspect) with it, ceding moral considerations (moral aspect) to the expediency of war.

⁸³ Treaty for the Limitation and Reduction of Naval Armaments (adopted 22 April 1930, entered into force 31 December 1930) part IV, art 22, relating to submarine warfare <<https://bit.ly/3roNVJ2>> accessed 1 March 2021.

⁸⁴ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/4.

⁸⁵ H Hays Parks 'Making Law of War Treaties: Lessons from Submarine Warfare Regulation' (2000) 75 *IntlLStudies* 339, 342.

⁸⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)* (Judgment) [1969] ICJ Rep 3.

4.2 A Dooyeweerdian 'Communitarian Semantics'

Secondly, the existence of CIL is determined according to 'other formal sources of knowledge'⁸⁷ – in other words, formal knowledge of the practice of states, or of any competent organ for that matter. In principle, formal knowledge of sources would embrace an entire host of indicators, whether written or unwritten, given that CIL is an indirect way of formalising law. It is important that the indicators are traceable to competent organs. This process of law-ascertainment for CIL will then involve the lingual (or symbolical) analogies of *legal declaration*, *legal signification* and *legal interpretation*. The ordering will of competent organs is expressed in a legal declaration – not a social fact. Such declaration may well be a correlation of written and unwritten expression, or by conclusive lawmaking behaviour, *rebus ipsis et factis*.⁸⁸ The practice (legal declaration) of competent organs already embodies and implies a belief (by an ordering legal will and accepted as such by the will of other legal subjects) that the rule followed in such practice is legally binding. Thus, it would be circuitous to assert that rules crystallise into CIL through the confluence of *opinio juris* and state practice.⁸⁹ The norms embodied in CIL are understood, amplified, communicated, and applied in legal intercourse among legal subjects (analogy to the social aspect).⁹⁰ Legal norms do not exist by themselves. In the dynamic process of lawmaking, they are norms of legal intercourse and interaction in inter-individual or inter-communal contexts.⁹¹ Yet their meaningfulness becomes a legal question in any legal dispute, in which case their legal signification will require the legal interpretation by 'law-applying authorities':⁹² domestic courts and international tribunals.

In interpreting the legal declaration at issue, courts and tribunals must apply rules of logic in a jural way, considering *legal identity*, *legal contradiction*, *legal attribution* and *imputation*. They also must observe *legal economy* and *legal harmony*, with an opened sense of *legal morality*. Their

⁸⁷ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/4.

⁸⁸ Eikema Hommes (n 38) 384.

⁸⁹ *ibid*; thus Dooyeweerd anticipates the ILC's recent turn to a single-element CIL.

⁹⁰ *ibid*.

⁹¹ Eikema Hommes (n 38) 384; thus to speak of law as process, *pace* the New Haven school, is to capture merely the kinematic analogy (legal dynamism) of a jural phenomenon; see R Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press 1995).

⁹² D'Aspremont here uses the phrase in the Hartian sense of a social practice, d'Aspremont (n 47) 52.

legal interpretation of the legal declaration in question will help deepen or otherwise clarify the norms at issue. In time, continued legal intercourse may serve to deepen the international legal order's appreciation and commitment to the norms embodied in the legal declaration, and as interpreted by law-applying authorities, thus resulting in heightened faith or trust in its legitimacy (faith aspect) by legal subjects from various spheres. It is against this backdrop where d'Aspremont's social thesis on the need for a 'communitarian semantics'⁹³ is better understood: domestic courts and non-state actors generate social practice to illuminate the meaning of the law-ascertainment criteria of the international legal system, thus participating in the reinforcement of the possibility for the international legal system of producing a vocabulary enabling ascertainment of the rules of which it is composed.⁹⁴

4.3 *CIL as a Formal Source of Law and the Promise of Pluralist Ontology*

Customary international law merely describes the form of a source of law (formal source). The concept 'customary law' itself lacks a juridical delineation that refers to its specific type of positive (jural) material content. What is needed is a granular examination of the material source of norms embodied within the formal source, founded on the modal sphere sovereignty of the jural aspect with its internal connections to the substratum of the preceding modal aspects.⁹⁵ But crucially, the material content of valid customary law, as with the material content of all formal sources of law, is also founded upon the multiplicity of the different entities and their enkaptic jural relationships.

This 'thick' account of sources of law amounts to a radical legal pluralism, which implies that the material sources of CIL are not mere invention of states. In their formation of CIL, competent organs ought to recognise the multiple forms of the spheres involved and their respective underlying principles that are each unique. The same rule applies to other formal sources of international law. On the domestic front, there are various normative complexes, the state being only one of them. Each of them has an irreducible material sphere of competence unique to their

⁹³ *ibid* 196.

⁹⁴ *ibid* 212.

⁹⁵ Dooyeweerd, *Encyclopedia* (n 1) Vol 8/1, 103.

nature, with their own jural sphere sovereignty, and forming a jural unity within a multiplicity of norms.⁹⁶ Moreover, if pursued to its logical conclusion, the crystallisation of CIL must be appropriate to the structure and nature of the diversity of spheres, entities and relations. At the very least, on the international level, states or other competent organs should respect their differentiated responsibilities and distinctive integrity in the development of CIL. Palombella would recognise this as a desirable characteristic of the plurality of legalities he writes of with keen approval:

The plurality of legalities is ensured if law is not monopolized by one single hand, and if it stems from a variety of those capable of triggering the generation of law. Accordingly, rulers (be they sovereign States or omnipotent global regulators) should better be also respectful to a law that is not their own, if the rule of law, not of men, has to thrive. Such premises, then, suggest that the plurality of sources (and one might add, in a wider ultra-state setting, *legalities*) qualifies, in principle, as a legal precondition of non-domination through law and of liberty.⁹⁷

In such theory of inter-legality, the law and liberty of spheres appear to be an external, sociological, explanation. Dooyeweerd's theory of differentiated responsibility with its distinctive integrity, however, leads to a truly radical view of international legal personality, where the normative claims of each sphere are drawn from the givenness of its inner nature. The very idea of the irreducibility and coherence of the modal aspects resists the overreach of one sphere over the others, or the undue dominance of one entity over the others; every sphere or entity is to regard the others' respective differentiated responsibility and distinctive integrity.

5 Inter-legality: Overlapping of Formal and Material Sources in Legal Enkapsis

Thus, legal enkapsis may take place in the international realm between two different genetic forms, or between different formal sources of law. An example is the already well-known intersection between treaty law and CIL demonstrating a 'duality of norms'. It can be the case that a treaty may also embody principles long considered as binding – those longstanding principles of CIL.

⁹⁶ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/2, 12.

⁹⁷ Palombella (n 2) 38.

This has been recognised in *Nicaragua v. United States*.⁹⁸ Here, the International Court of Justice (ICJ) held that the UN Charter cannot be said to exhaust all principles dealing with the use of force, as the latter is also addressed by CIL, which exists contemporaneously with treaty law – yet the former may also be grafted into the latter by way of codification. A ruling predating the *Nicaragua* case and stating the same principle has been expressed in the Philippine case of *Kuroda v. Jalandoni*,⁹⁹ which concerned the trial of a Japanese officer for war crimes during World War II. In this case, lawyers for the Japanese officer argued that, under the principle of legality, he could not be tried for war crimes under the Hague Convention on Rules and Regulations covering Land Warfare because the Philippines was not a party to it. However, the Philippine Supreme Court held that while the Philippines was not a party to the Hague Convention, it was nevertheless bound to it because its provisions are also part of CIL, which in turn became domestic law through the Incorporation Clause of the 1935 Philippine Constitution. This analysis is limited only to the level of formal sources.

One illuminating example of the legal enkaptic interlacement of two different material sources in one genetic form of law may be taken from the field of international humanitarian law (IHL). There is a host of treaties embodying the customary practice of protecting religious beliefs and convictions in situations of armed conflicts,¹⁰⁰ which shows how ecclesiastical practice and religious freedom intersect with the sphere that is for the most part the concern of states. Another example is the customary practice of environmental protection, where there is also a host of instruments, declarations, military manuals and pieces of national legislation providing for certain forms of protection for the environment in situations of armed conflict.¹⁰¹ These examples show the correlation of two distinct interests embodying CIL – the regulation of the means and methods of warfare, with the protection of the environment in times of armed conflict. This illustrates bi-layered legal enkapsis: firstly, the intersection of different formal sources – national

⁹⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14; see also *North Sea Continental Shelf Cases*.

⁹⁹ *Kuroda v Jalandoni* (26 March 1949) Republic of the Philippines Supreme Court, GR No L-2662.

¹⁰⁰ ICRC, 'Practice Relating to Rule 104 Respect for Convictions and Religious Practices' (*ICRC IHL Database*, 2021) <<https://bit.ly/3DAOI8>> accessed 1 March 2021.

¹⁰¹ For example, ICRC, 'Practice Relating to Rule 43 Application of General Principles on the Conduct of Hostilities to the Natural Environment' (*ICRC IHL Database*, 2021) <<https://bit.ly/31ei2YG>> accessed 1 March 2021.

legislation, treaty law and CIL – and secondly, the meeting of two different material sources providing material-legal principles; that is, environmental protection and the international public regulation of armed conflict in one instrument: treaty law. The norms in question pertain to IHL but also involve norms taken from other spheres; moreover, these latter derived norms do not in any way invalidate the nature of the positive law as IHL.

6 Community Interests in International Law: *South West Africa* and *Barcelona Traction*

South West Africa and *Barcelona Traction* illuminate the reach of the *Encyclopedia of the Science of Law*, not only in understanding the formation of CIL in particular but of the development of international legal processes in general. After ruling in 1962 in the preliminary phase of *South West Africa*¹⁰² that it had jurisdiction to hear the challenges brought by Liberia and Ethiopia against apartheid practiced by South Africa in South West Africa, the ICJ made a surprising turnaround in 1966. There, it dismissed the applications on the ground that the applicants lacked *locus standi*, having possessed no subjective legal right or interest in the subject matter of their claims against South Africa.¹⁰³ It held that the applicants have no subjective rights under the concept of the ‘sacred trust of civilisation,’ as such ground may only be understood within the particular organs and mechanisms established by the League of Nations, which by then were already defunct.

The ICJ’s analysis of how the notion of ‘sacred trust’ was drafted into the legal structure of the mandates is a useful study in how law relates to morality and faith in an analogical way. While agreeing that all states have an interest in seeing the realisation of sacred trust, the ICJ nevertheless held that such a realisation cannot be merely a ‘moral or humanitarian ideal’;¹⁰⁴ it must assume a particular legal form – a (legal) positivisation – to grant rights and obligations, as for example, the UN trusteeship system or the charter’s provisions on non-self-governing territories, which are expressly provided for in relevant texts.¹⁰⁵ Thus,

¹⁰² *South West Africa (Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319.

¹⁰³ *South West Africa Cases (Second Phase) (Ethiopia v South Africa; Liberia v South Africa)* (Judgment) [1966] ICJ Rep 158 (hereinafter *South West Africa Cases (Second Phase)*).

¹⁰⁴ *ibid* [52].

¹⁰⁵ *ibid*.

it 'must be given form as a juridical regime in the shape of that system'.¹⁰⁶ The ICJ held that in the structure of the mandates there was 'no residual juridical content [that] could, so far as any particular mandate is concerned, operate *per se* to give rise to legal rights and obligations outside the [mandate] system as a whole'.¹⁰⁷

The mandates provided two modes of rights entitlement of members. The first was the 'conduct' provision in the mandates, pertaining to the mandates as a whole, and the second was the 'special interests' provisions, which were granted to the states as individual members and their nationals.¹⁰⁸ The court held that the applicants founded their claims on the conduct provisions, but this could not be maintained, because the sacred trust as a right was positivised in a different way. The form it had taken meant that individual member states could not, on their own – on the basis of subjective rights not granted by the League's charter – directly intervene in the work of administering the mandatories. This right belonged only to the league's organs under the conduct provisions.

In Dooyeweerd's modal theory, the ethical (moral) aspect stands immediately next or anticipatory to or above the jural aspect; immediately succeeding the ethical aspect is the upper limit of the aspects, the faith or certitudinal aspect. These two latter regulative aspects open up, deepen and disclose a fully orbéd meaning of the jural aspect as expressed in concrete legal systems through a developed idea of justice. Thus, here we see how the deepened principles of jural morality may come into being: in the case of apartheid, what would have been relevant is the principle of legal personality as guided by the 'regulative jural principle of the *value of the human being (dignitas humana)*',¹⁰⁹ which acquires a significant role in the disclosure or differentiated development of the public spheres of jural freedom of the human personality within the state as well as within the non-political spheres of life.¹¹⁰ The moral aspect expressed as *dignitas humana* may be incorporated into the jural aspect, not in the original sense but in an analogical manner. Because the jural and the moral constitute distinct aspects that nevertheless cohere with each other, one may not be reduced into the other.¹¹¹ Moreover, this legal

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid* [54].

¹⁰⁸ *ibid.*

¹⁰⁹ Strauss (n 38) 571.

¹¹⁰ *ibid* 572.

¹¹¹ In contrast to Hart's later 'inclusive legal positivism' as discussed in d'Aspremont (n 47) 85; see HLA Hart, *The Concept of Law* (3rd ed, Clarendon Press 2012) 193–212.

use of the idea of sacred trust appeals to notions of the sanctity of faith in the highest ideals of civilisation. In his dissent, Judge Tanaka alludes to its Christian theological roots by saying the principle has been present as far back as Vitoria.¹¹²

The faith aspect in turn also refers back to, and builds on, the earlier moral aspect, which to begin with, evinces the jural-moral duty not to violate the legal faith concept of sacred trust by causing others injury, and the notion of *dignitas humana* as basis for fundamental equality of races. In fact, there is strong evidence that the mandate system was not the sole juridical expression of such a sacred trust, but is traceable as already well-established in nineteenth-century international law, both as ‘consensus of opinion of all civilized states’¹¹³ and as a treaty norm, in particular, as embodied in the General Act of the Berlin Conference of 26 February 1885.¹¹⁴ The mandates could therefore have also embodied CIL. The *South West Africa Cases* palpably demonstrate a court yet unprepared to recognise an international society’s deepened and disclosed understanding of the principle of equality among races as to vest in any state the right – equivalent of an *actio popularis*¹¹⁵ – to hold South Africa accountable for its practice of what would today be a violation of a *jus cogens* norm.

Four years later in the *Barcelona Traction* case, it would make an about-face, at least with respect to the idea of states being able to make a claim on behalf not just of their particular interests but also in the name of common interests, in the unlikely case of a private commercial dispute.¹¹⁶ I approach *Barcelona Traction* from two levels. Firstly, there is the question of the diplomatic protection proper and its implications. The ICJ found customary norms for the international legal dispute from municipal law, one traceable to a specific sphere – that of business, where commercial law has developed rules germane to the life-world of

¹¹² *South West Africa Cases Second Phase*, Dissenting Opinion of Judge Tanaka 265; it might be called today a ‘political theology’, or perhaps, more accurately, a ‘legal theology’; see Antony Anghie’s critique of Vitorian thought as ‘a particularly insidious justification’ of colonialism because it masks itself ‘in the language of liberality and even equality’ for the conquered natives. A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2008) 28.

¹¹³ In other words, of CIL; see CH Alexandrowicz, ‘The Juridical Expression of the Sacred Trust of Civilization’ (1971) 65 AJIL 149, 155–59.

¹¹⁴ *ibid.*

¹¹⁵ *South West Africa Cases Second Phase* [88].

¹¹⁶ *Barcelona Traction, Light & Power Co, Ltd (Belgium v Spain)* [1970] ICJ Rep 3 (herein-after *Barcelona Traction*).

corporations. It thus provided what may well be a precedent in international law on the separate and distinct legal personality of a corporation from that of its shareholders, as well as on the ascertainment of the nationality of a corporation.¹¹⁷ It recognised the domain occupied by the corporation as a domestically governed entity, where municipal rules under which it has been created are relevant to the international dispute.¹¹⁸ Secondly, there is the now famous *obiter dictum* of the ICJ in *Barcelona Traction* pertaining to obligations *erga omnes*, or those ‘owed to the international community as a whole’¹¹⁹ arising from CIL.¹²⁰

7 Legal Enkapsis, Coordinational Interests and the Public-Private Divide in International Law

On the first point, we can speak of enkaptic interlacements between the commercial interest involved in *Barcelona Traction* and international public interest involving states. Indeed, one specific instance of a relevant public interest is that of a state that may have been injured by the failure of another to afford legal protection to the former’s nationals. This is separate from the interest of the municipal corporation itself.¹²¹ Here, too, we see how public international law intersects with the realm of private law, in this case, the domestic law of corporations, in a way that might in other circumstances be regarded as being in conflict. This analysis also brings to sharper relief a more nuanced, legal enkaptic treatment of the public-private divide obtaining in the correlation of domestic law-international law in a phenomenon of inter-legality.

Moreover, there is also a retrociprocal connection by international law to the historical and economic aspects, on account of the rapid changes in international commerce, which have transformed and widened the original scope of diplomatic protection ‘to municipal institutions, which have transcended frontiers and have begun to exercise considerable

¹¹⁷ L Jahoon Lee, ‘Barcelona Traction in the 21st Century: Revisiting Its Customary and Policy Underpinnings 35 Years Later’ (2006) 42 *Stan J Intl L* 237.

¹¹⁸ *Barcelona Traction* [38].

¹¹⁹ *ibid.*

¹²⁰ Such obligations being able to arise both from *jus cogens* and non-peremptory norms. See S Besson, ‘Theorizing the Sources of International Law’ in S Besson & J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 174–75.

¹²¹ See Article 33 of ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries’ (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, reproduced in [2001/II – Part Two] YBILC 31.

influence on international relations'.¹²² On the second point, an expanding complexity of international legal processes has led to the deepening of the international legal order's understanding of international law – the *anticipatory analogy* to the moral aspect¹²³ – where certain violations of CIL now implicate the interest of the international legal order as a whole and not just that of directly affected states. Thus, the ICJ in *Barcelona Traction* recognised the existence of that distinct class of obligations *erga omnes*, which makes 'an essential distinction' 'between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection'.¹²⁴ The case demonstrates the reality of a plurality of inter-legalities: (1) the derivation via legal enkapsis of CIL from municipal practice on the legal personality and nationality of corporations, itself sourced from private (corporation) law, which was then (2) applied to a (public) international law dispute involving states; and (3) the diverse conflicting interests involved – of the corporation shareholders as against the corporation itself, of states with conflicting claims to the right to invoke diplomatic protection; and of the international legal order itself, which requires predictability, stability and fairness in the resolution of such conflicting claims.

In Palombella's terms, here we encounter a single specimen of law, CIL, bringing the composite legal nature of a dispute to the surface. The dispute implicates functional fields of law that embody material interconnectedness and at the same time concern overlapping legal regimes and legal orders: (private) commercial law, national law, (public) international law, domestic orders, transnational and international legal orders.¹²⁵ Finally, these regimes and orders are self-referential, reflexive, resilient and coherent in themselves.¹²⁶ As a retrocipatory analogy to the numerical aspect, these variegated multiplicity of legal interests are woven into a jural unity as coordinated by the enkaptic relations of states in international law as coordinational law. Indeed, *Barcelona Traction* also underlines the need for jural harmonisation of interests implicated in the coordinational relationship of states (the retrocipatory analogy to the aesthetic aspect) in a proportionate manner (retrocipatory analogy to the economic aspect) that any ruling in a legal dispute must consider.

¹²² *Barcelona Traction* [37].

¹²³ *ibid* [33–34].

¹²⁴ *ibid*.

¹²⁵ Klabbers & Palombella (n 7) 1.

¹²⁶ Palombella (n 2) 368.

Jural harmonisation eschews any excessive pursuit of a legal interest over against the others and finds an optimal balance between and among them according to a retributive measure of proportionality.¹²⁷ The coordinational relationship between and among states is correlatively enkaptic in nature, as opposed to one involving a part-whole relation characterised by relations of hierarchy and subordination, or of a foundational relation, where one is the basis of another. In coordinational relationships, even where the issues involved pertain to fundamental norms of international law, states never lose their identities as states! This is an essential inference made out of the doctrine of societal sphere sovereignty. The failure to properly understand the distinction between coordinational and communal relations all too often gives rise to unmet, if not unreasonable expectations of what international law can do.¹²⁸ It is also at the heart of a proper understanding of the phenomenon of inter-legality as legal enkapsis.

8 Conclusion

Recent codification work of the ILC has devalued the two-factor formula of state practice and *opinio juris* to identify CIL. This gives rise to the question of how to account philosophically for this development. I suggest that such account is properly a question of the concept of law – one often elided, papered over, or otherwise not recognised as a foundational issue, in the continuing debates about the nature of CIL. I have shown that a fruitful alternative approach to understanding CIL is the *Encyclopedia of the Science of Law* developed by Herman Dooyeweerd. It distinguishes the jural aspect from all other aspects of reality, accounting for the former's internal structure as it is interconnected with that of the fourteen other aspects, in ascending (anticipatory and regulative) and descending (retrociatory and constitutive) analogical relations. Dooyeweerd's approach examines the nature of the jural dimension through three interrelated pillars.

The first pillar is his modal theory of the jural aspect, which is one of the irreducible yet interconnected universal multidimensional modes or

¹²⁷ Dooyeweerd, *Tentative Encyclopedia* (n 14) Vol 8/3, 29.

¹²⁸ Or for that matter, the stress Palombella places on the distinction between normative claim and compliance in inter-legality, Palombella (n 2) 371; by Dooyeweerd's account, and against Hart, international law is not a primitive system, because the domestic analogy does not apply to the primarily coordinational nature of the international legal order.

aspects of reality, and through which the second and third pillars – entities and enkapsis – are viewed and understood as legal phenomena. The second pillar is his theory of entities, which give rise to pluralistic legal ontologies unique to their particular practice or sphere (entities as rule complexes, each sovereign in its own orbit and exhibiting a differentiated responsibility and differentiated integrity). The third pillar concerns the various ways in which entities and relations engage in enkapsis or enkaptic interlacements, resulting in complex intertwinements of the formal and the material sources of law with profound implications on the private-public (law) distinction. Meanwhile, in 'legal enkapsis' different material sources of law display a mutual inter-relationship (enkaptic interlacement) that bind and limit without altogether cancelling one another – a process accounted for by a growing and contemporary movement in legal anthropology as 'inter-legality'. Enkapsis combines the two pillars of his philosophy – the theory of modal aspects and the theory of entities, into a comprehensive and integrative concept of law, thus providing a better systematic and coherent account of inter-legality.

From an encyclopedic modal analysis, there is an inner antinomy to the well-known two-factor formula: the received interpretation of an *opinio* is an analogy to the psychic sphere, which precedes and anticipates (points towards) the jural aspect. The psychic aspect cannot define what is normative of the jural aspect, for such would deny the jural aspect its inherent normativity and violate the principle of sphere sovereignty, in which no aspect is reducible to any other aspect. Rather, *opinio* should be interpreted as the ordering will of a competent organ correlated with the legal will of legal subjects accepting legal responsibility arising from material-legal principles positivised into law by the competent organ. Moreover, this must be seen against the background of the entire constellation of the architectonic modal structure of the jural aspect, in which various analogies come into play in the proper understanding of the making of CIL. Further, I have shown the relevance of legal enkapsis through an examination of CIL as a formal source of law and how it actually weaves together material legal principles in *concreto*. Thus, CIL may be an original source of law in one sphere of competence but may be a derived source of law in another. In other words, its material bases may lie in the particular enkaptic interlacements involved, displaying a multilayered inter-legality of structural-material legal principles. As such, CIL becomes an embodiment of differentiated material legal principles derived from other fields and spheres of law.

Finally, I have demonstrated this phenomenon of differentiated inter-legality in CIL through concrete examples: in the duality of treaty and CIL norms, IHL, international economic law and state responsibility. Dooyeweerd's theory of the sources of law is a prescient and comprehensive approach to inter-legality in both domestic and international law, in which we are able to account: 'for the very fact that several times *either the norm to be applied in a specific case, and controlling it, derives from a different context and from a different regime of legality, or the norm to be applied results from a concurring/competing legality*'.¹²⁹

¹²⁹ Palombella (n 2) 373 (emphasis in the original).